U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 25Jul2002

CASE NO.: 2001-AIR-5

In the Matter of

GEORGE T. DAVIS, Jr. and DIANE DAVIS,
Complainants

v.

UNITED AIRLINES, INC.,
Respondent

DECISION AND ORDER DENYING RELIEF

Procedural Background[1]

This proceeding arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR Act", "AIR 21" or "Act"), 49 U.S.C. §§ 42121, *et seq.*, Public Law 106-181, Title V, § 519 and the regulations thereunder at 29 C.F.R. Part 1979. Airline employees are a "critical link in ensuring safer air travel . . . [and] aviation employees perform an important public service when they choose to report safety concerns." Sen. Kerry, CONG. REC., p. S2855 (March 17, 1999).[2] AIR 21 is designed to protect those employees from discrimination by the carriers in retaliation for complaints related to air carrier safety.

On February 13, 2001, Complainants, George T. Davis and Diane Davis, filed their complaint, wherein they alleged that Respondent, United Air Lines, Inc., (hereinafter "United" or UAL") suspended George T. Davis, without pay and later terminated his employment in retaliation for providing information regarding United to the Federal Aviation Administration ("FAA"). Mr. Davis was reinstated within a month.

On August 28, 2001, the Regional Administrator for the Occupational Safety and Health Administration, Region VIII, Denver, Colorado, (hereinafter "OSHA") determined that the Davis' complaint had no merit. OSHA found the complaint untimely, a finding which I later over-turned. The complainants objected to OSHA's findings and, on September 26, 2001, filed a request for formal hearing. The relief they seek includes: purging their personnel records of any

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[1] Complainant's exhibits are marked "CX," Respondent exhibits "RX," Joint exhibits "JX" and the transcript testimony "TR." Each reference to a TR page number will refer to the witness whose testimony is being discussed, unless otherwise indicated.

[2] Complainant's brief, page 1.

relevant derogatory references to the events; full restoration of all rights, benefits, privileges; back wages; compensatory damages; reasonable attorney fees and costs; an order forbidding future discrimination against the complainants; and, such other relief as deemed lawful and appropriate, under the circumstances.[3]

On August 28, 2001, this matter was referred to the Office of Administrative Law Judges. I was assigned the case on October 1, 2001. A Notice of Hearing and Pre-Hearing Order was issued, on October 9, 2001, scheduling a formal hearing in Denver, Colorado, which after delays commenced on April 29, 2002. On October 22, 2001, the complainants filed a Response to Notice of Hearing and Pre-Hearing Order. United filed a response to the complainants' objections to the findings of the U.S. Department of Labor, on November 20, 2001.

On April 23, 2002, I granted UAL's Motion for Summary Decision relating to complainant Diane Davis.[4] In that Ruling and Order dismissing her complaint, I found that the AIR Act did not provide Mrs. Davis, also a UAL employee, "derivative" protection for the protective activity, if any, of her spouse, George Davis, a UAL mechanic. Moreover, nothing in the entire proceeding even suggested she suffered from any type of "retaliation" or discrimination by UAL as a result of her husband's activities. I denied the complainant's Cross Motion for Summary Decision, on April 23, 2002. On April 25, 2002, I denied UAL's Motion for Summary Decision relating to complainant, George Davis.

The hearing convened on April 29, 2002 and closed on May 3, 2002. All parties were afforded a full opportunity to present testimony, offer documentary evidence, submit oral arguments and post-hearing briefs. The following exhibits were received into evidence: Complainant Exhibit Numbers ("CX") 9, 27-30, 33, 39, 43, 50, 53, 56, 59, 61-64, 70, 73-74, 77-82, 85-86, 88-94, 98, 103, 104, 122-124, 126, 129, 130A, 132, 134-135; and, Respondent Exhibit Numbers ("RX") A-5 through A-9, A-12 & A-13, B-3, B-5 through B-6.[5] RX B-7 and B-8 were considered as evidence illustrating exhibits which had been admitted. Post-hearing briefs were received from the Complainants and the Respondent on July 3, 2002.

Complainants' Contentions

Mr. Davis alleged that on September 29, 2000, he found evidence of a hydraulic leak after

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[3] I ruled punitive damages were not available under the Act.

[4] Complainant, Diane Davis, a United employee in cabin services, had alleged that she was retaliated against by United, by means of a United letter to her, entitled "Safety Review", dated April 15, 2001, and suffered emotional distress as a result of United's allegedly wrongful conduct towards her husband. She alleged no "protected activity" of her own. United asserted that the only discipline, if in fact it was discipline, received by Mrs. Davis was the result of her excessive use of sick leave.

[5] UAL was given, until May 17, 2002, the opportunity to challenge the accuracy of CX 134 post-hearing. Although CX 135 was admitted, column "I" of that exhibit was not admitted or considered. The one-hour post-hearing deposition of Mr. McDaniel was permitted.

inspecting an aircraft. Mr. Davis asserted that his supervisor, Larry Cannon, "signed-off" the aircraft as ready for flight, thereby overriding Mr. Davis' safety assessment. Thereafter, Mr. Davis notified the Captain of Flight 437, Kevin Lambeth, of his safety assessment. Pilot Lambeth confirmed the existence of the leak and refused to take off until the leak was fixed, which caused a delay in take-off. (ALJX-1a).

A hydraulic leak incident of October 25, 2000, was discussed extensively at trial. The Complainant is not claiming he reported a safety violation on that day. (Trial Transcript ("TR") 64). This October 25, 2000 hydraulic leak incident was not raised in the complaint and only arose later, in discovery, on April 15, 2002. Since the incident had been incorporated as a basis for Mr. Davis' termination, on November 30, 2000, the information was readily available. While I have the authority, under 29 C.F.R. § 18.5(e), to treat this incident as if it had been raised in the pleadings, I was not asked to do so, at the hearing. Moreover, Complainant's counsel explicitly stated it was not a basis of their action. I issued a Show Cause Order and subsequently have determined not to amend the pleading to incorporate it. Nevertheless, I analyze and discuss it in order to resolve the matter for the parties.

In addition, Mr. Davis alleged that, on November 16, 2000, he discovered a problem with a tire on one of the aircraft and issued an order for the tire to be repaired before take-off. Mr. Davis further alleged that his supervisor, Dan Rash, claimed that the tire did not need to be repaired and cleared the aircraft for take-off. Again, Mr. Davis notified the captain of the aircraft of the status of the tire. The captain then insisted that the tire be changed, which resulted in a one hour flight delay.

On November 16, 2000, United conducted an investigation regarding Mr. Davis' continuing inability to dispatch his flights on time. As a result of the investigation, United placed Mr. Davis on suspension without pay. On November 30, 2000, United terminated Mr. Davis' employment effective November 16, 2000. On December 12, 2000, Mr. Davis appealed his termination action. After discussions with the International Association of Machinists and Aerospace Workers ("IAMAW" or "IAM") union, on December 15, 2000, Mr. Davis was reinstated to the position he had occupied prior to November 16, 2000, but he was assigned to a new work area. United reduced the discipline (termination action) to a "Level 4." On December 18, 2000, Mr. Davis returned to work, but he was not paid for lost earnings during his suspension, November 15, 2000 through and including December 17, 2000.

Mr. Davis alleges that he was suspended without pay and terminated from his employment in retaliation for providing information and/or causing information to be provided to the Federal Aviation Administration.

Respondent's Contentions

Despite Mr. Davis' allegations, United asserted that its decision to terminate Mr. Davis was related solely to his "delay performance" over several months and was not the result of the

two incidents cited by Mr. Davis. Specifically, United asserted that Mr. Davis' delay performance, a measure of his ability to dispatch trips on time, began to deteriorate, upon expiration of the Machinists' Union contract, to a level below his (average) performance level. United notes that Mr. Davis' delays had increased from three per month to over fifteen per month. United concludes that Mr. Davis was terminated on the basis that he was unable to provide a plausible explanation for his decreased delay performance, and therefore, United considered Mr. Davis' conduct an illegal "job action" aimed to aid the union's effort in the negotiation of a new contract with United.

STIPULATIONS

The parties stipulated and agreed that:

1. United is an air carrier subject to the terms of the Act. (TR 70).

2. Mr. Davis was a UAL employee at the time of the alleged protected activities. (TR 73).

3. Mr. Davis was reinstated, effective December 18, 2000, to the position he had occupied prior to his termination (but assigned to a new work area). (TR 74).

4. Mr. Davis was not paid for the period of November 17, 2000 through and including December 17, 2000. (TR 75).

5. Mr. Davis lost six thousand dollars ($6,000) in back pay during the period of his suspension.

ISSUES

1. Whether the Complainant, Mr. George T. Davis, Jr., was an employee of the Respondent, United Air Lines, Inc., on the dates of the alleged protected activity in 2000?

2. Whether the Complainant, Mr. George T. Davis, Jr., engaged in protected activity under AIR 21, on September 29, 2000 and November 15, 2000, or some other established date, that is, was he, or persons acting on behalf of him, about to provide or did provide his employer or the Federal Government information relating to any alleged or actual violation of any federal law relating to air carrier safety?

3. If the Complainant, Mr. George T. Davis, Jr., engaged in protected activity as an employee of the Respondent, United Air Lines, Inc., whether the Respondent was aware of the protected activity?

4. Did the Complainant, Mr. George T. Davis, Jr., suffer unfavorable personnel actions, i.e. was he discharged or discriminated against in respect to compensation, terms, conditions, or privileges of employment?

5. If the Complainant, Mr. George T. Davis, Jr., engaged in protected activity as an employee of the Respondent, United Air Lines, Inc., and the Respondent was aware of the protected activity, did the protected activity contribute, in part, to the decision by the Respondent to temporarily terminate the services of the Complainant, Mr. Davis?

6. If the Complainant, Mr. George T. Davis, Jr., established a *prima facie* case of a violation of the employee protection provisions of AIR 21, whether the Respondent, United Air Lines, Inc., demonstrated by "clear and convincing" evidence that it would have terminated Mr. Davis even in the absence of the protected activity?

7. If the Respondent, United Air Lines, Inc., presented clear and convincing evidence of a legitimate motive for temporarily terminating the services of Mr. Davis, whether the Complainant established by a preponderance of the evidence that the Respondent retaliated against him for engaging in protected activity, i.e, that the Respondent's stated legitimate reasons were a pretext?

8. If the Complainant established the elements of his claim, what injuries, if any did he suffer?

9. If the Respondent violated the Act, what are appropriate compensatory damages, costs and expenses and what further relief, if any, (i.e., reinstatement, compensation, terms, conditions and privileges of employment, abatement orders) should be ordered?

THE LAW

History of the Act[6]

The protective provisions of AIR 21 were first introduced in 1988 before the 100th Congress. Three separate bills were drafted to provide whistleblower protection for employees of the airline industry. (See 100 H.R. 3812, introduced by Representative James L. Oberstar on December 18, 1987; 100 H.R. 4023, introduced by Rep. Kleczka on February 25, 1988; and 100 H.R. 4113,

introduced by Reps. Glickman and Molinari on March 9, 1988). Of the three bills only H.R. 3812 accorded filings with and investigations by the Federal Aviation Administration (FAA).

Congress specifically rejected the designation of the Federal Aviation Administration

[6] This history of AIR 21is taken nearly verbatim from Administrative Law Judge Lee J. Romero's Recommended Decision and Order in *Taylor v. Express One International, Inc.*, Case No. 2001-AIR-2 (February 15, 2002).

("FAA") as the most appropriate agency to handle aviation whistleblower cases. (House Report No. 100-883, 100th Congress, 2d Session, 3, committed on August 12, 1988). The House Committee chose the Secretary of Labor to handle aviation whistleblower complaints because the Department of Labor had "expertise in determining the motivation of an employer in dismissing an employee." (Id.) However, the foregoing bills failed in committee.

In the 104th Congress, Rep. James E. Clyburn introduced 104 H.R. 3187, on March 28, 1996, which also authorized the Secretary of Labor to receive and investigate complaints of discrimination in the aviation industry. Hearings before the Subcommittee on Aviation of the Committee on Transportation and Infrastructure were held on July 10, 1996. Similarly, Senator Kerry also introduced 104 S. 2168 (the Aviation Safety Protection Act of 1996), on September 30, 1996, which provided for filings and investigations of air carrier discrimination by the Secretary of Labor. The Senate bill was referred to the Aviation Subcommittee of the Senate Commerce, Science and Transportation Committee. Both initiatives failed in committee.

The precursor to the AIR Act was embodied in bills introduced in the 105th Congress as 105 H.R. 915 (the Aviation Safety Protection Act of 1997) by Reps. Boehlert and Clyburn and 105 S. 100 introduced by Senator Kerry. The House Committee Report No. 105-639 of July 20, 1998, acknowledged that "private sector employees who make disclosures concerning health and safety matters pertaining to the workplace are protected against retaliatory action by over a dozen federal laws," but that "there are no laws specifically designed to protect airline employee whistleblowers." (H.R. Rep. No. 105-639, 105th Cong., 2d Sess., 51). The provisions of both bills were subsequently modified. The provisions of 105 S. 100 merged into 105 S. 2279, on July 30, 1998. Neither bill survived conference committee. Noteworthy of the language of 105 S. 2279 is the amended Section 519 which ". . . would provide employees of airlines, and employees of airline contractors and subcontractors, with statutory whistleblower protection . . . The language in this Section is similar to whistleblower protection laws that cover employees in other industries, such as **nuclear energy**." (Emphasis added)(105 S. Rpt. No. 105-278, 105th Cong., 2d Sess., 4, 22).

In the 106th Congress, Reps. Boehlert and Clyburn introduced 106 H.R. 953 which, through amendments, resulted in 106 H.R. 1000, the "Wendell H. Ford Aviation Investment and Reform Act for the 21st Century." (106 H.R. Rpt. No. 106-513, 106th Cong., 2d Sess., March 8, 2000). Senate bills 106 S. 648 and 106 S. 1139 were incorporated into 106 S. 82 on March 8, 2000. (106 S. Rpt. No. 106-9, 106th Cong., 1st Sess.). Based upon compromise and conference AIR 21 emerged from the foregoing bills and became law on April 5, 2000 as Public Law 106-181, 49 U.S.C. § 42121.

Elements of AIR 21 Violation

The employee protection provision of AIR 21 are set forth at 49 U.S.C.A. §§ 42121 (passed April 5, 2000). Subsection (a) proscribes discrimination against airline employees as follows:

> No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
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> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
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> (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
>
> (3) testified or is about to testify in such a proceeding; or
>
> (4) assisted or participated or is about to assist or participate in such a proceeding. (Emphasis added).

The evidentiary or burden of proof requirements of the complaint procedure embodied in subsection (b)(2)(B) of the Act demand a showing by a complainant of ". . . a *prima facie* showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(i). An employer is required to demonstrate " . . . by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(ii). The criteria established for a determination by the Secretary is "that a violation of subsection (a) has occurred **only** if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." (Emphasis added). 49 U.S.C. § 42121(b)(2)(B)(iii). See also 29 C.F.R. § 1979.104. Relief may not be ordered (by the Secretary) if the employer "demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(iv); see also 29 C.F.R. § 1979.109.

Applicable Jurisprudence and Standards of Proof

The legislative history of AIR 21 supports a conclusion that the decisional law developed under the whistleblower protection provisions of the Energy Reorganization Act of 1974

("ERA"), as amended in 1992, the Whistleblower Protection Act ("WPA") and environmental statutes provide the framework for litigation arising under AIR 21.

The statutory scheme established by AIR 21 essentially mirrors the protective provisions of the prevailing nuclear and environmental statutes. The exceptions are that AIR 21 provides extraordinary powers to OSHA to order immediate reinstatement of airline employees upon a showing of reasonable cause and places a more stringent "clear and convincing" standard upon an employer in defense of its adverse employment action. Accordingly, the jurisprudence developed under existing whistleblower statutes will be applied to the instant case.

The ERA whistleblower statute contains the same burden of proof standards which are included in the AIR 21 requirements statute. The employee protection provision of the ERA, 42 U.S.C.
§§ 5851, was amended by Congress in 1992 "to include a burden-shifting framework distinct from Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-805, 93 S.Ct. 1817 (1973)." *Trimmer v. United States Department of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999). Under the ERA and AIR 21, during the investigative process, a complainant is required to establish a *prima facie* case that his protected activity is a contributing factor in the unfavorable personnel action alleged in the complaint. It was the intent of Congress to make it easier for whistleblowers to prevail in their discrimination suits, but it was also concerned with stemming frivolous complaints. *Trimmer*, at 1101, n. 5. "Even if the employee establishes a *prima facie* case, the Secretary cannot investigate the complaint if the employer can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. Thus, only if the employee establishes a *prima facie* case and the employer fails to disprove the allegation of discrimination by clear and convincing evidence may the Secretary even investigate the complaint." *Id.*

Once the case proceeds to a formal hearing before the Secretary, the complainant must prove the same elements as in the *prima facie* case, but must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in the employer's alleged unfavorable personnel decision. *Trimmer*, at 1101-1102; *See Dysert v. Secretary of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997)(holding that the complainant's burden is a preponderance of the evidence). Thereafter, and only if complainant meets his burden does the burden shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. *Trimmer*, at 1102.

A *prima facie* case requires: (1) that the employee is governed by the Act; (2) that he or she engaged in protected activity as defined by AIR 21; (3) that as a result of such activity, he or she suffered adverse employment action, such as discharge; and (4) that a nexus existed between the protected activity (as a contributing factor) and the adverse action or circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action.
29 C.F.R. §§ 24.5(b)(2)(i)-(iv); *Macktal v. U.S. Department of Labor*, 171 F.3d 323, 327 (5th

Cir. 1999); *Zinn v. University of Missouri*, Case No. 1993-ERA-34 (Sec'y Jan. 18, 1996); *Overall v. Tennessee Valley Authority*, Case No. 1997-ERA-53 at 12 (ARB Apr. 30, 2001). The foregoing creates an inference of unlawful discrimination. With respect to the nexus requirement, proximity in time is sufficient to raise an inference of causation. *Id*., and cases cited.

In *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. §§ 1221(e)(1), the Court observed:

> The words "a contributing factor" . . . mean <u>any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision</u>. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating,""substantial," or "predominant" factor in a personnel action in order to overturn that action.

Marano, at 1140 (citations omitted).[7]

If a complainant presents a *prima facie* case showing that protected activity was likely a contributing factor in the unfavorable personnel action, then the respondent has an opportunity to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 29 C.F.R. §§ 24.5(c)(1) and Part 1979. In other words, a respondent may avoid liability under AIR 21 by producing sufficient evidence that clearly and convincingly demonstrates a legitimate purpose or motive for the personnel action. *See Yule v. Burns Int'l Security Service*, Case No. 1993-ERA-12 (Sec'y May 24, 1995). Although there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is a higher burden than preponderance of the evidence but less than beyond a reasonable doubt. *See Yule, supra* at 4.

If a respondent meets its burden to produce a legitimate, nondiscriminatory reason for its employment decision, the inference of discrimination is rebutted. The complainant must then assume the burden of proving by a preponderance of the evidence that the respondent's proffered reasons are "incredible and constitute pretext for discrimination." *Overall*, at 13. As the Supreme Court noted in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519, 113 S.Ct. 2742, 2753 (1993), a rejection of an employer's proffered legitimate, nondiscriminatory, explanation for adverse action permits rather than compels a finding of intentional discrimination. *See also Blow v. City of San Antonio, Texas*, 236 F.3d 293, 297 (5th Cir. 2001).

In reviewing the numerous cases on the shifting burden of production and ultimate burden

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[7] It is recognized that this definition of "contributing factor" originated in the legislative history of the Whistleblower Protection Act, 5 U.S.C. § 1221 *et. seq*.. *See* 135 Cong.Rec. 5035 (1989). The legislative history of the AIR Act does not set forth a definition of "contributing factor." In *Taylor v. Express One International*, 2001-AIR-2 (February 15, 2002), Administrative Law Judge, Lee J. Romero, Jr., cited the above WPA definition. This definition is only applicable to the establishment of the complainant's *prima facie* case.

of proof, the U.S. Court of Appeals for the Eighth Circuit in *Carroll v. U.S. Department of Labor*, 78 F.3d 352, 356 (8th Cir. 1996), *aff'g Carroll v. Bechtel Power Corp.*, Case No. 1991-ERA-46 (Sec'y Feb. 15, 1995), observed:

> But once the employer meets this burden of production, "the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). The presumption ceases to be relevant and falls out of the case. The onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reasons for the challenged employment action and the ultimate burden of persuasion remains with the complainant at all times. *Burdine*, 450 U.S. at 253, 256.

Accordingly, the fact a complainant has established a *prima facie* case becomes irrelevant.[8] Rather, the relevant inquiry becomes whether the complainant has proven by a preponderance of the evidence that the respondent retaliated against him or her for engaging in a protected activity. *Carroll, supra* at 356.

The one exception to the claimant's burden of proof arises under the "dual motive" analysis: once the evidence shows that the employer's proffered reason for the adverse personnel action is not legitimate, and that the discharge was motivated at least in part by retaliation for protected activity, then the employer must establish by "clear and convincing" evidence that it would have taken the same unfavorable personnel action in the absence of protected activity.[9] *See Mount Healthy City Sch. Dist. v. Doyle,* 429 U.S. 274 (1977)(preponderance standard); *Stone & Webster Engineering Co. v. Herman*, 115 F.3d 1568 at 1572 (preponderance standard).

Protected Activity

The first requisite element in establishing a *prima facie* case is a showing of "protected activity." In ERA cases, the courts limit protected activity to reports of an act which implicates safety definitively and specifically. *See American Nuclear Resources v. U.S. Department of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998) citing *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995).[10] "The ERA does not protect every incidental inquiry or superficial

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[8] Recognizing the point at which the complainant's *prima facie* case becomes irrelevant, I nevertheless include it in my subsequent discussion for ease of analysis and review.

[9] In *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (1984), the Ninth Circuit held the *Mt. Healthy* "dual motive" analysis was permissible under the ERA.

[10] In *Bechtel*, the court protected a carpenter's acts disagreeing with his foreman about the procedure for protecting radioactive tools. In *American Nuclear Resources*, the court declined to find a complaint regarding an isolated event alleging no safety breach constituted a protected activity. The *Stone* court found the complainant's speech in a meeting with his co-workers constituted protected activities because he was acting in furtherance of safety compliance and it served as another notice to the employer. A complaint to a mine safety committee would have been sufficient in *Phillips, infra* at 778.

suggestion that somehow, in some way, may possibly implicate a safety concern." *American Nuclear Resources*, at 1295, *supra, citing Stone, supra*, at 1574. However, an employee's complaints may constitute "reasonably perceived violations" of the environmental acts. *Johnson v. Old Dominion Security*, Case Nos. 1986-CAA-3, 1986-CAA-4 and 1986-CAA-5 (Sec'y May 29, 1991); *see also Crosby v. Hughes Aircraft Co.*, Case No. 1985-TSC-2 at 14 (Sec'y Aug. 17, 1993).

The Secretary has broadly defined a "protected activity" as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it does not matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations." *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. The alleged act must implicate safety definitively and specifically. In other words, the complainant's concern must at least "touch on" the subject matter of the related statute. *Nathaniel v Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). Additionally, the standard involves an objective assessment. The subjective belief of the complainant is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997).

Internal complaints made to company supervisors concerning safety and quality control are protected activities under the ERA. *Bassett v. Niagara Mohawk Power Corp.*, Case No. 1985-ERA-34 (Sec'y Sept. 28, 1993).[11] The Administrative Review Board (herein Board) and the remaining Federal Circuit Courts have repeatedly held that internal complaints constitute protected activity under the ERA.[12] *See Hermanson v. Morrison Knudsen Corp.*, Case No. 1994-CER-2 (ARB June 28, 1996); *Dysert v. Westinghouse Electric Corp.*, Case No. 1986-ERA-39 (Sec'y Oct. 30, 1991); *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied* 478 U.S. 1011 (1986); *Passaic Valley Sewerage v. U.S. Department of Labor*, 992 F.2d 474, 481 (3d Cir. 1993).

Specifically, in *Mackowiak, supra,* the Ninth Circuit Court of Appeals, relying on precedent applicable here, held that Section 5851 of the ERA protects quality control inspectors from retaliation caused by internal complaints regarding safety or quality problems. In addition, the Court recognized that enforcement of safety regulations may cause expense and delay to the employer. The Court wrote:

> [a]t times, the inspector may come into conflict with his employer by identifying problems that might cause added expense and delay. If the NRC's regulatory scheme is to function effectively, inspectors must be free from the threat of

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[11] I note, however, that the U.S. Court of Appeals for the Fifth Circuit has repeatedly held that internal complaints are not protected activity within the context of the Energy Reorganization Act. *See Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984); *Macktal v. U.S. Department of Labor*, 171 F.3d 323 (5th Cir. 1999).

[12] The Court's statement, in Stone at 1574, that "[W]histleblowing must occur through prescribed channels" refers to the channels set forth in the statute, not to channels established by an employer.

retaliatory discharge for identifying safety and quality problems.

735 F.2d at 1164. The employer in *Mackowiak* in turn argued that regulatory scheme requires companies to retain "abrasive, insolent and arrogant" quality control inspectors if they comply technically with the requirements of the job. *Id.* The Court flatly rejected the employer's argument and maintained that the ruling simply forbids discrimination based on competent and aggressive inspection work. *Id.* The Court concluded that contractors regulated by § 5851 may not discharge quality control inspectors because they do their jobs too well. *Id.*

Knowledge of protected activity may not be imputed to a supervisor without proof. The Secretary has held that knowledge of the protected activity on the part of the alleged discriminatory official is an essential element of a complainant's whistleblower case. *Bartlik v. TVA*, Case No. 88-ERA- 15, Sec. Ord., Dec. 6, 1991, slip op. at 7 n.7, and Sec. Dec., Apr. 7, 1993, slip op. at 4 n.1, *aff'd*, 73 F.3d 100 (6th Cir. 1996). Although knowledge can be shown by circumstantial evidence, that evidence must show that an employee of the respondent with authority to take the complained of action, or an employee with heavy or substantial input in that decision, had knowledge. *Id.*; *Mosely v. Carolina Power & Light*, 94-ERA-23 (Final Decision & Order, August 23, 1996, Administrative Review Board) citing *Bartlik*; and, *Thompson v. TVA*, 89-ERA-14 (Sec'y July 19, 1993).

AIR 21 specifically legislated that complaints made to the employer as well as the federal government constitute protected activity. Therefore, under current Board case law, prevailing Federal Circuit Court jurisprudence, and the 1992 Amendments to the ERA, I conclude that internal complaints are protected activity under AIR 21. Moreover, the fact that complaints are not made within an employer's prescribed channels is not determinative. Furthermore, I observe that the form of the complaint is not critical and even an informal complaint to a supervisor may be sufficient to establish protected activity. *Samodurov v. General Physic Corp.*, Case No. 1989-ERA-20 (Sec'y Nov. 16, 1993).

Temporal proximity may be sufficient to raise an inference of causation in a whistleblower case. *Tracanna v. Arctic Slope Inspection Service*, Case No. 1997-WPC-1 at 8 (ARB July 31, 2001). As the Board recognized in *Tracanna*, "where protected activity and adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation is compromised."

The application of disparate treatment in whistleblower cases requires a showing that employees with whom a Complainant seeks to compare himself are "similarly situated" to evince a suggestion of retaliation from different treatment. *See Tracanna, supra* at 9.

EVIDENCE

Generally

Mr. William Norman has been UAL's Vice President of Line Maintenance, out of San

Francisco, for the past three years. Mr. Norman began work for UAL in 1984, as a line aircraft mechanic. He is now responsible for air-worthiness decisions for all of UAL's aircraft fleet. Nearly all of UAL's approximate 5,400 gate mechanics are under his supervision. All line maintenance mechanics and "leads" are members of the IAMAW. According to Mr. Norman, United serves about one-quarter million people per day. Mr. Norman considers UAL a leader in industry safety. The Federal Aviation Administration has, on occasion, recognized UAL's safety practices and, in at least one instance, used them as a model for another airline. Mr. Norman testified that "safety is the foundation of our company."

Mr. Frank Krasovec is UAL's overall Maintenance Operations Manager at Denver International Airport ("DIA"). Mr. Krasovec is responsible for the safe operation of UAL aircraft utilizing DIA. He is in charge of the 450 UAL aircraft mechanics employed at DIA. Mr. Krasovec reports to Mr. Norman. Mr. Krasovec testified that "safety is first and paramount and does not compete with on-time performance." Mr. Gene Sibley works for Mr. Krasovec. Mr. Sibley has worked thirty-eight years for UAL, beginning as an aircraft mechanic. Mr. Larry Cannon, a UAL Maintenance Supervisor, works for Mr. Sibley. Mr. Cannon has worked for UAL for thirty-three years. Mr. Dan Rash is also a UAL Maintenance Supervisor. Mr. Rash also works as a UAL Maintenance Controller. Messrs. Norman, Krasovec, Sibley, Cannon, Harwood and Rash all have FAA Airframe and Power Plant ("A&P") licenses, which are required by the FAA to work on aircraft as a mechanic. (CX 129; 14 C.F.R. §§ 65.73, 65.85, 65.87). Mr. Sibley testified that all of UAL's maintenance management came up through the ranks and none of them would jeopardize safety; their "real obligation" is to the Federal Aviation Regulations or "FAR". Possession of an A&P license gives each holder an individual responsibility (for safety) according to Mr. Norman.

Messrs. George T. Davis, Jr., Michael McGuire, Robert Carney, Michael McGuire, Dennis Smith, Richard Conner, Kilian Zerr, Chuck Richards, Richard Stoll, Thomas Rowland, Gregory Komel, John Connelly, and Scott Brown, are all UAL A&P licensed aircraft mechanics assigned to DIA and working for the above-named supervisors. Jerry McDaniel is an AMT who has worked for 17 years at UAL. Mr. Cannon testified that UAL mechanics are a resource UAL wishes to keep.

Mr. Davis' Background and Actions

Mr. Davis is a highly trained and skilled UAL gate mechanic who takes his work very seriously. He also takes his obligation for the safety of aircraft passengers to heart. He has worked for UAL for seventeen years. He began his career as a jet engine mechanic for the United States Air Force. He began work at Denver International Airport in 1995. Today he remains an aircraft gate mechanic, as he was in 2000. He worked Gate B-16 at DIA during the day shift, one of the busiest shifts, all of 2000 and handled five to six aircraft per day. Mr. Davis testified that before the summer of 2000 he used to try to avoid delaying aircraft for maintenance reasons ("delays"). However, he subsequently became too stressed. He used to always contest being

assessed a given delay with the zone controller, who assigned responsibility for delays. But, he stopped contesting the delays in the summer of 2000. He was "walked-off" on November 16, 2000.[13]

Mr. Komel testified that Mr. Davis is very conscientious; more so than anyone else. According to Mr. Komel, Mr. Davis is not one to say "it's good enough." Mr. Davis was earning $25 per hour-plus during a forty-hour week when "walked-off" in 2000. During the Christmas holidays, he would typically work 64-hour weeks and earn time and one half to double time. Although he lost the agreed upon amount in wages during his temporary termination, his union brothers donated $3,500 to help the family during that time. He hopes to repay that. He said he suffers emotional distress from the Fall 2000 discipline and is now constantly on edge. He worries when a supervisor approaches him and recently suffered an emotional breakdown. He admitted however, with one exception, that since he returned to UAL, they have let him do his job without second-guessing him.

Mr. Davis denied that all the delays reflected on the DB2 were attributable to him, for example he was charged with one delay at a time he was not even working. On some occasions, Mr. Davis testified, he would sign-off on the repair made by another mechanic and thus take responsibility for the delay himself. Mr. Richard Stoll also testified that since Mr. Cannon had suggested he might be fired next, the lead mechanics would send out a boxman when he needed a write-up so the boxmen would take the delay.

In support of his contention that his delay performance did not justify his termination, Mr. Davis submitted several data analyses prepared by Mr. Gunner Kaersvang, a consultant.[14] (CX 130-A, CX 132, CX 134, and CX 135 [without column "I"]). Those exhibits illustrate the cause of his delays and compare his activity with other UAL gate mechanics. Mr. Kaersvang prepared CX 130-A using the UAL format from data in the UAL AMIS report (Aircraft Maintenance Information System) to reflect delay performance in terms of percentages. That illustrated other mechanics, who were not disciplined, such as Mr. Komel, had had a higher percentage increase in delays than Mr. Davis.[15] CX 130-A shows that in and after July 2000 Mr. Davis' delays, as a percentage of his maintenance write-ups, increased from 1.6 - 7.4 % to 16.1% - 23.3%. CX 132 reflects the percentage of write-ups that resulted in delays comparing Mr. Davis with thirty other

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[13] "Walked-off" refers to the fact when an employee is suspended or terminated he or she loses their security clearance and must be walked-off the secure portion of the airport to a public area.

[14] Mr. Kaersvang had obviously worked extremely hard at analyzing the delay statistics and preparing detailed charts and analyses, however, it was apparent that he had not been properly prepared to testify as a witness. His testimony was confusing and at times unintelligible. That coupled with the dubious sources of information he had relied upon resulted in the exclusion of much of what he had prepared.

[15] CX 132 illustrates that Mr. Davis had an average delay to "write-up" rate percentage of 4.6% from February through August 2000, and a 19.7 % rate for July through November 2000, a change or increase of 429%. Whereas, Messrs. Bradfield and Rouse showed increases of 1,072% and 1,229% respectively for the same periods. This was introduced by the Complainant in an attempt to show he did not have the worst change in delay rate, at DIA, in July 2000. However, UAL did not consider rates or percentages, but rather the raw numbers.

DIA mechanics. CX 134, which he derived from the UAL 2000 Excel Report, reflects each of Mr. Davis' delays and the reason for each. He also prepared CX 134 which is based on CX 39 and the UAL 2000 Excel Report. CX 135 is a summary of Mr. Davis' delays in 2000.

Mr. Davis also testified about two instances in December 2000 and January 2001 when he or another mechanic did not write-up hydraulic leaks they observed contrary to UAL policy. His reason for not writing them up was his initial fear of retribution and suggested the other mechanic felt the same way. However, Mr. Davis is now determined not to let that happen again. Mr. Davis called mechanics the "last defense for safety." He believes there is still management pressure to "push" planes with mechanical problems and finds UAL's "safety-gram" program ineffectual.

Mr. Krasovec testified that there has never been any indication that Mr. Davis had not adhered to UAL's Maintenance Manuals in his entire career. Mr. Sibley testified that UAL derives its maintenance manuals from the aircraft manufacturer's and modifies them to be more cautious. FAA regulations require compliance with the manufacturer's or operator's maintenance manuals. (14 C.F.R. § 43.1(a) & (b); CX 33; CX 129).

Mrs. Diane Davis testified about the deleterious effect of the termination on her husband and family. She said Mr. Davis' relationship with his son deteriorated and that his face would do weird things. He would get angry when she tried to discuss matters with him. He had trouble sleeping and they worried about paying their bills. For a short period of time, before being rehired, Mr. Davis began to drink a 6-pack to fall asleep. After Mr. Davis returned to work, in December 2000, he took it day-by-day not knowing whether or not he would be fired.

United Procedures & IAM-UAL Year 2000 Labor Relations Background

Other than performing mandatory inspections based upon hours of flight or otherwise required by the FAA, at DIA UAL generally performs two types of maintenance on its transient aircraft which are scheduled for flights: hangar maintenance and gate maintenance. "Hangar" maintenance is generally performed overnight, in a hangar, on the repairs which had been "deferred" during scheduled flights. The idea is to have UAL's fleet ready for their scheduled flights and perform the maintenance when the aircraft are not needed for trips. "Gate" maintenance is performed at the actual DIA arrival/departure gates between flights on "live trips" as Mr. Zerr testified. It is intended to keep the aircraft operating safely, with "on-time" departures. When a "gate" repair of a critical item cannot be accomplished another aircraft may be substituted for the particular flight and the aircraft with the defect taken to the hangar for servicing.

United's Operations Series 40 (Manual), Chapter 40-8, contains detailed instructions concerning reporting delays and cancellations. (CX 126). It states, " Never sacrifice or compromise safety for <u>any</u> reason. If a conflict occurs between safety and any other factor, resolve it on the side of safety." (Emphasis in original). This Manual lists the delay codes for which all departments are responsible and for which maintenance is responsible, i.e., AB, AM,

AR, AS, DM, FM, LL, LS, and defines each. (CX 126). "AR" is for aircraft reliability and "AS" is for servicing - maintenance. An "AR" delay is done to accomplish non-routine repair, replacement, adjustment, or deferral due to an initial failure associated with the reliability of aircraft systems. An "AS" delay results from aircraft maintenance personnel servicing aircraft items not associated with the basic reliability of the aircraft, components and associated systems. (CX 126, page 18). So, I conclude that while "AR" delays would normally be related to air carrier safety, it appears "AS" delays would not. The Manual also requires delays with two or more unrelated causes to be charged to the cause "which produced the largest portion of the delay" or if of (nearly) exactly equal intensity to the last one. (CX 126, page 8, para. 8).

UAL's manual concerning Mechanic Personnel - Responsibilities and Duties, paragraph 4, informs A&P mechanics they are responsible to their lead mechanic or supervisor for the proper servicing of an airplane or any other mechanical work they are assigned and that they are responsible for informing their supervisor or lead mechanic of any condition which involves a considerable amount of time so steps may be taken to make repairs without unnecessary delay. (RX A-9).

Mr. Sibley explained that customers demand on-time departures and arrivals. All the airlines have goals related to delays or on-time departures; it is an industry standard. UAL has no quota system concerning delays, but managers are graded on delay performance. UAL had a goal, in 2000, of zero delays and resolving maintenance issues prior to departures. (CX 98). CX 122 is an extract of Mr. Sibley's performance report for 2000. It shows his delay performance was about 4% below UAL's goal. Messrs. Krasovec's and Rash's performance report show the same. (CX 123; CX 124). Mechanics' supervisors are not graded on the number of mechanic write-ups. Mr. Sibley testified that it is desirable for mechanics to identify everything wrong with an aircraft.

UAL'S 1994 contract with the IAM was set to expire at mid-night, July 12, 2000. (RX A-12). The acrimony between the IAM, its members and UAL was so serious during the contract negotiations, which began in late 1999, that the time period was referred to as "the summer from hell." Anonymously-posted derogatory flyers were removed by UAL management nearly every (summer) day at DIA, with the IAM members as the suspected and likely source of the flyers. (RX A-10; CX 103).[16]

After July 12, 2000, UAL observed a number of "dramatic" adverse changes in daily, monthly and yearly statistics related to aircraft air-worthiness or availability.[17] For example, while UAL had 600 aircraft available, at 6:00 A.M. daily, with only twelve historically "out of service" that number increased to 35 "out of service". (See also chart in CX 103). Maintenance

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[16] My colleague suggested that (legitimate) union activities do not remove the shield of whistleblower protection, in *Immanuel v. Wyoming Concrete Industries, Inc*., 95-WPC-3 (ALJ, Oct. 24, 1995).

[17] See CX 122 (an incomplete and redacted evaluation form) and Mr. Norman's testimony at TR 754 indicating their focus changed, in April 2000, to getting the flights out even if delayed.

cancellation numbers doubled. Maintenance "cycle" times increased dramatically. The number of maintenance "write-ups" from mechanics per day increased from 1,100 to 1,500 and pilot maintenance "write-ups" increased to 1,200 per day. (See CX 27; CX 28; CX 103). Mr. Norman testified there was no change in the variables, other than mechanics' behavior, which could account for the increases and delays. For example, UAL's fleet had not changed, training had not changed, FAA rules and regulations had not changed, and UAL's rules had not changed. These changes and delays had a "rolling" impact causing cancelled flights and tardiness.

The day after the contract expired, July 13, 2000, IAM mechanics engaged in a "sick-out" at DIA and UAL-wide, according to Mr. Sibley. Mr. Sibley mailed 25 letters to day shift mechanics, under his supervision, whom he believed had participated in the illegal "sick-out", including Mr. Davis. (RX A-6; CX 104). That letter warned about creating gate delays. Moreover, UAL was unable to persuade mechanics to work overtime to cover its needs. Some mechanics who did work asked not to be paid overtime in order to avoid what they feared would be potential union repercussions. Mr. Sibley testified UAL had hoped such discipline, i.e., the sick-out letters, would result in a "tapering-off" of the problems, but it did not. Mr. Davis testified there were mechanics who probably participated in a sick-out, but he was not one of them. (TR 387). The IAM-UAL Agreement proscribes "sit-downs" or "slow-downs" as types of illegal job actions. (RX A-12, page 81).

According to Mr. Norman, UAL responded to the adverse changes by discussions with the IAM, but the statistics continued to worsen. UAL had its supervisors discuss the matter with their mechanics and ask them not to participate in work actions, yet the numbers worsened. Finally, UAL sought a Temporary Restraining Order ("TRO") against the IAM in Federal District Court.[18] It also directed management to use one-on-one counseling sessions and warnings to attempt to stop the perceived job actions. After various legal machinations, the Court of Appeals for the Seventh Circuit affirmed a preliminary injunction against the IAM to preclude member job actions.[19] *See, UAL v. IAM*, 243 F.3d 349 (7th Cir. 2001). Mechanic Gregory Komel testified that after the issuance of the TRO, he found maintenance discrepancies but did not write them up for fear it would be considered an (illegal) job action.

Even IAM mechanics noticed an increase in the number of aircraft going to the hangar for maintenance based on hydraulic leak write-ups after the IAM contract expired. Mr. Richard Conner, who has been a UAL mechanic since 1968, testified that some leaks were legitimate and some were not. The increased hangaring concerned him because it "put the monkey on his back" as far as responsibility for the repair.

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[18] The complainant made much of that portion of Mr. Norman's affidavit (CX 103, page 7) wherein he stated, " . . . it is possible to identify precisely those delays and cancellations that are due to the slowdown tactics (and to exclude delays and cancellations caused by weather, air traffic control, or other reasons)." I find Mr. Norman's testimony on this point credible and the suggestion that this was a false statement is not credible.

[19] In a lengthy Order, I took judicial notice of the federal court decision, but not for the truth of the facts therein.

With this background in mind, Mr. Norman directed his subordinate managers, including Mr. Krasovec at DIA, to examine operating performance statistics and look for changes in employee behavior during this period, i.e., changes in the number of maintenance "write-ups", and, increases in the number of "delays", etc. They were to examine a number of other variables as well, such as shift changes and assignments. If (negative) changes were found, they were advised to warn or discipline the individual. Mr. Krasovec testified that no one individual mechanic was singled out for retaliation. He added that there was never any question that mechanics were not safely maintaining UAL aircraft. Mr. Krasovec believes any idea that safety was suffering due to delay performance issues was unfounded. Since UAL does not disclose disciplinary matters, one's co-workers might not have an accurate impression of the reasons for UAL's actions.[20]

According to Mr. Sibley, this review process began after his assignment to the task in late October (on or after October 25, 2000) or early November 2000. Mr. Sibley enrolled Mr. Cannon to assist him in the review. UAL has no review process for its mechanics, such as annual performance reports, but does for management personnel. According to Mr. Sibley, UAL has established delay performance goals, delay performance is part of management's total compensation package and management is rated on delay performance. (CX 99).

According to Mr. Cannon, UAL has a "non-punitive" system of discipline based on "levels". A "level 1" discipline would result in a "letter of concern" , while a "level 5" would be termination. "Level 4" is always a "last chance" notice. These levels of discipline were agreed upon by UAL and the IAM pursuant to negotiations. Whenever an employee receives a "level", he or she may "grieve" it pursuant to an agreed-upon process, as Mr. Davis subsequently and successfully did with his "level 5" of November 2000. (CX 50). The records of various "levels" administered are removed from one's personnel records every two years. The Rules of Conduct UAL had agreed to with the IAM were admitted as RX A-13.[21] The Introduction to those Rules advise that UAL's levels of discipline are intended to be non-punitive (corrective) and progressive.[22]

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[20] The Complainant made much of that portion of Mr. Krasovec's affidavit in the District Court litigation wherein he stated Mr. Davis was held out of service on Nov. 21, 2000, rather than Nov. 16, 2000. (CX 104). However, Mr. Krasovec's testimony explaining the error was credible.

[21] It appears a mechanic's failure to report a safety violation potentially or actually resulting in damage or injury would be punishable under Rule 30, normally beginning at level 1, except if the employee's disciplinary record or the particular circumstances warranted a higher level. Interestingly, such a violation is not under the agreed-upon mandatory termination provisions.

[22] Mr. Davis was terminated for violating Rule 24 which states, " Restricting work output or encouraging others to do so. Level 4 to discharge." It is not a rule requiring mandatory termination. A violation of Rule 24 would result in discipline at the level specified, i.e., level 4 to discharge, except if the employee's disciplinary record or the particular circumstances warrant a higher level. Mr. Cannon admitted UAL had no evidence Mr. Davis had encouraged or restricted other's work output. (TR 294).

The parties agreed Mr. Davis had received a level 3 on July 12, 2000, for his misuse of sick leave from his supervisor, Anita Murphy. (RX A-7). Mr. Davis admitted he was not sick on July 13, 2000, when he took sick leave. (RX A-5; TR 386). At that time a higher level of discipline was threatened for future infractions. (See RX A-7; A-13 and Cannon's testimony). The parties also agreed he currently has no level 4. Mr. Davis testified he had no issue with the level 1 of November 12, 1997 and a level 3 from September 4, 1998.

According to Mr. Cannon, July 15, 2000, was a "water-shed" for UAL. They used a DB2 report, which reflects a "level playing field" for the mechanics to compare delay performance before and after that date. He and Mr. Sibley chose not to use particular (or detailed) delay information because neither of the two had been involved in all of the delays. Mr. Sibley, who lacked the capability and access at DIA to retrieve the delay data needed, asked the UAL computer department in San Francisco to send him a computer-derived listing of the top fifty "worst" delay performers at DIA. DIA's computers only had limited capacity and did not retain the necessary data. The latter sent DIA a DB2 report listing the fifty mechanics. Even before he had added the individual mechanic's names (beside their UAL identifiers) to the report, he observed that the delay entries pertaining to Mr. Davis stood out. Mr. Cannon testified and the DB2 report showed that before July 15, 2000, Mr. Davis was able to "manage" his gate, but then right after that date his delays tripled from 3-4 a month to 15 delays per month. In fact, he had 18 delays in the 13 days he worked after July 13, 2000.[23] His average number of write-ups remained fairly constant. Other than his behavior, Mr. Cannon could find no other reason for the changed performance given no other fundamental changes at his gate.

Mr. Sibley decided to use "AR" (mechanic repair delay) and "AS" (mechanic service delay) actual delays and the raw numbers versus percentages as the review criteria. The AR and AS delays were they only ones within "our" control, according to Mr. Sibley. (CX 126, page 18, defines the various codes). According to Mr. Cannon, not all maintenance write-ups result in delays. Mechanics do not always fix write-ups unless they exceed the tolerances permitted by the maintenance manuals. Write-ups within tolerances may be deferred. Moreover, write-ups are part of the job UAL wants mechanics to do, according to Mr. Cannon. Thus, the number of mechanic write-ups was not used as a criterion in their review. He added that Mr. Davis' write-ups in 2000 were fairly consistent.

It was decided the more detailed Excel Report, which also contained references to delays, was not to be used because UAL had agreed with the IAM not to use it for disciplinary purposes and since nearly any employee could make Excel Report entries it was not reliable for use in a disciplinary process. The Excel Report is primarily used to identify trends related to aircraft systems which cause troubles. Mr. Krasovec uses the Excel Report to identify systemic problems and to prepare reports for the FAA. In fact, Mr. Komel testified that delays had been attributed to him erroneously, in the AMIS system. This is so because others, such as "leads", can decide against whom to charge delays. Mr. Komel testified the Excel Report can be inaccurate. Mr.

[23] Mr. Davis worked 13 days in August 2000 and had 10 delays. In September, he worked 20 days and had 16 delays. In October he worked 21 days and had 17 delays. In November 2000, he worked 7 days and had seven delays.

Rash testified that there is an interest at DIA and there are frequently disputes over who is credited with a delay. Zone Controllers, who are responsible for 5-7 gates, assign delays based on information supplied them by UAL's various departments. They have cameras to monitor the gates and if they do not see the reason for the delay, they will inquire. Mr. Cannon testified that he had not reviewed the Excel Report, in the Fall of 2000, in regard to the decision to terminate Mr. Davis.

Mr. Sibley testified that the basis for Mr. Davis' termination was his behavioral change, beginning after the IAM-UAL contract ended, as reflected by the dramatic increase in his delay performance reflected in the DB2 report's raw data.[24] His 2000 write-ups remained fairly consistent, but after July 15, 2000, he had much higher delay performance with about the same number of write-ups. Mr. Sibley said that with only two people reviewing the data and an average of 35 delays per day it would have been physically impossible to review (particular) individual delays (or the reasons for them). He admitted in using the raw data that he could not rule out the possibility Mr. Davis' delay statistics were for reasons other than a work slowdown. Mr. Sibley added that he had also pulled a gate plot and performed gate observations. Mr. Davis worked at gate B-16, in Area "1". Area "1" had eleven gates and was the source of two-thirds of the DIA performance delays. According to Mr. Sibley, Mr. Davis' had the worst performance of all the fifty gate mechanics named on the DB2. When asked why Mr. Davis was the only DIA mechanic terminated because of his increased delay performance, Mr. Sibley testified he was the worst and that was a "starting point." He emphatically denied Mr. Davis was terminated for reporting safety violations. Additionally, Mr. Douglas Harwood testified that he himself was involved in the removal of another employee, in the Fall of 2001, which was based solely on delay performance, based on DB2 report data.

Mr. Sibley testified that the (overall) delay performances did not improve until January 2001 - after the IAM contract was ratified. Other UAL mechanics at other locations had similarly been terminated for delay performance, but unlike Mr. Davis were not subsequently returned to work. UAL (presently) has had no reason to review individual mechanic delay performance statistics for the past sixteen to eighteen months. If a mechanic's write-up is a cause of a delay, it is automatically reported to the FAA and entered on the DB2 report, according to Mr. Sibley.

Although, prior to terminating Mr. Davis, Mr. Sibley had not been familiar with the reasons for the former's delay performance, he subsequently ascertained that the September 29, 2000 hydraulic leak incident was not among the delay statistics he had reviewed in reaching his decision to terminate Mr. Davis. Moreover, Mr. Sibley testified that he was unaware of the November 16, 2000 alleged defective tire incident until after he had already "walked-off" Mr. Davis for his delay performance. Nor was that incident reflected in the DB2 report. Mr. Cannon admitted Mr. Davis had not been counseled about his delay performance prior to his termination. Although neither Mr. Sibley, Mr. Richards nor Mr. Davis testified the tire matter was raised, Mr. Cannon testified that Mr. Davis initially raised the tire incident at the November 16, 2000 meeting

[24] RX A-7 contains UAL's paperwork for Mr. Davis' termination.

with Mr. Sibley and him, but they informed him that is not what the meeting was about. (TR 271).

Mr. Krasovec testified that on the morning of November 16, 2000, Mr. Sibley discussed the proposed discipline for Mr. Davis and suggested a "level 5" if Mr. Davis could not adequately explain the reason for his increased delay performance.

Although Mr. Sibley used Dan Rash's office, on November 16, 2000, to discuss "delay performance" with the complainant, Mr. Rash, who had been involved in the tire incident earlier that morning had not informed Mr. Sibley about it. Mr. Sibley admitted that he had testified at his deposition that Mr. Rash may or may not have mentioned the tire incident. RX A-2 is the DB2 report containing the delay data Mr. Sibley relied on. When confronted with the DB2 delay performance data, Mr. Davis explained he was doing the best he could, that the Boeing 727 aircraft were old and required extensive maintenance, and that he lacked training on newer Airbus aircraft which used his gate. Mr. Sibley did not find this a satisfactory explanation for the increased delays and thus walked Mr. Davis off the job. He denied having any retaliatory motive. Mr. Cannon agreed the November tire incident played no role in Mr. Davis' termination. Finally, Mr. Cannon admitted UAL had not looked at Mr. Davis' output of physical work, in making their decision.

Mr. Chuck Richards is both an aircraft maintenance technician and the local IAM shop steward. In the late morning of November 16, 2000, he was called into a meeting with Messrs. Sibley, Cannon and Davis, in Mr. Rash's office. Mr. McDaniel testified that he saw Messrs. Sibley and Cannon speak with Mr. Rash for about two minutes in the latter's office on November 16, 2000, just before Messrs. Davis and Richards went in.[25] (Dep. 4). Messrs. Sibley and Cannon questioned Mr. Davis about his poor job performance, excessive number of delays after July 12, 2000, and his high write-up count. Mr. Davis explained the pilots' contributions to the delays, his lack of training on the A-320, and the fact the gates with the older B-727's encountered many more maintenance problems. Mr. Richards did not believe Mr. Davis received a "level" that day. Mr. Richards did not believe management's reasons for walking-off Mr. Davis. Rather, he felt they were sending a message using him so other mechanics would avoid similar write-ups. He added that, in the Fall of 2000, although UAL managers put more pressure to get the aircraft out he never witnessed any compromises in safety.

According to Mr. Cannon, no one raised either the September 29, 2000 or the November 16, 2000, incidents at the November 30, 2000, Investigative Review Hearing ("IRH") hearing (chaired by Mr. Krasovec) nor did the complainant then raise any issue of UAL retaliation for either of those incidents. That hearing resulted in Mr. Davis' termination. The IRH summary and documents were admitted as RX A-9.

Mr. Scott Brown represented Mr. Davis at the IRH as his union representative. To his knowledge no other mechanic at DIA had been discharged, in 2000, for delay performance. He

[25] Mr. McDaniel, like Mr. Davis, had also received a "job action" letter from UAL for his alleged participation in union activities.

identified the exhibits he submitted on Mr. Davis' behalf at the IRH. (CX 27; CX 28; CX 33). He confirmed there was no reference to safety violations, or the tire or hydraulic fluid incidents at the IRH, rather only Mr. Davis' delay performance was discussed. At the IRH, Mr. Brown made allegations that pilots had engaged in a job action by inflating reports of mechanical defects, and so were flight attendants. He believes using delay performance is not a fair representation of a gate mechanic's work. He admitted that during the federal court action the IAM had argued that UAL should discipline individuals for delays rather than seek a remedy from the IAM. It was his opinion that RX B-6 did not reflect evidence of an illegal job action.

September 29, 2000 Hydraulic Leak

Mr. George T. Davis, Jr.(Complainant and a mechanic), Mr. Michael McGuire (a mechanic), Mr. Robert Carney (a mechanic), Mr. Joe Williams (FAA), Mr. Larry Cannon (UAL Supervisor), Mr. Gene Sibley (UAL Operations Manager), and Mr. Frank Krasovec (UAL DIA Manager for Aircraft Safety), all testified concerning the circumstances surrounding the hydraulic leak which occurred on September 29, 2000, a basis of the complaint. Pilot Lambeth's report of the incident and Mr. Sibley's written response were admitted as CX 93.

As Mr. Davis made his usual pre-flight inspection of the aircraft at Gate B-16, on September 29, 2000, he observed two leaks, one on the leading edge of the wing tip which is not at issue and a second at the air conditioning ("a/c") bay. According to Mr. Davis, the hydraulic fluid was dripping on the ground as a result of the leak. Two other mechanics, Messrs. McGuire and Smith also observed the hydraulic fluid leak. Mr. Davis supervisor, Larry Cannon, was called to the scene. Mr. Davis opened the aircraft a/c bay belly door and fluid ran out. Mr. Cannon, who observed no leak, directed the door be closed and offered to "sign-off" the purported defect so the flight could depart. Mr. Davis advised the pilot of the leak and the latter insisted it be repaired. It was repaired. According to Mr. Davis, had the leak been signed-off without repressurizing the system and the aircraft allowed to fly, UAL would have been in violation of its own maintenance manuals and FAA regulations.

Mr. McGuire was working as a "boxman" or a type of "floating" gate mechanic, on September 29, 2000, when Mr. Davis called him over to the aircraft at his gate for help with a hydraulic leak. He observed Boeing 737's frequently had problems with such leaks. He observed hydraulic fluid on the ground and on the air conditioning bay door. Mr. Smith also observed about a pint of hydraulic fluid on and under the a/c door. Mr. Davis testified that hydraulic fluid spilled on the ground when he opened the air conditioning bay door. Mr. Cannon, their supervisor, said he saw no active leak and would sign-off the aircraft so the maintenance would be deferred. According to Messrs. McGuire and Davis, Mr. Cannon had not even inspected the area prior to making this determination. Mr. Smith testified Mr. Cannon squatted down and looked under the aircraft. This differs from Mr. Davis' recollection that Mr. Cannon never moved from the aircraft landing gear area. However, since the line was not pressurized it would not actively leak. Mr. McGuire informed the aircraft captain the leak had not been properly trouble-shot. The pilot discussed the matter with Mr. Cannon. Mr. Cannon subsequently told them to finish the job. Mr. Davis had used a screw driver to move various lines aside and found the hydraulic leak

spraying under pressure. Use of a screwdriver in such cases is not unusual, although UAL has a special tool, an aluminum pry bar, for moving such lines. Once the active leak was observed there was no choice but to repair it. The line they repaired provides the only hydraulic fluid to operate the nose landing gear. According to Mr. Smith, these lines, with a history of cracking, have no tolerances for leaks since they would create a fire hazard when the aircraft is in use and the line is pressurized.

Mr. McGuire had never heard Mr. Cannon say he was out to get Mr. Davis. CX 91 is Mr. Cannon's written statement concerning the incident. Mr. Cannon added that preventing delays is not more important than safety. According to Mr. Cannon, this September 29, 2000 incident played no role in walking Mr. Davis off. He took no retaliatory action against Mr. Davis for the incident, although he admittedly counseled Mr. McGuire over it several weeks later.

Captain Lambeth send a complimentary letter to Messrs. Davis, Smith and McGuire for their "outstanding" job related to this incident pointing out they had prevented a potential irregular or emergency situation. (CX 92).

October 25, 2000 Hydraulic Fluid Leak[26]

On October 25, 2000, Mr. Davis testified he discovered an aircraft with a hydraulic leak in the left gear wheel well. (TR 323). He showed it to Messrs. Dennis Smith, the boxman, and Ms. Dana Eades, his supervisor. Mr. Davis did not recall if he had called for her or she just showed up. Mr. Smith saw hydraulic fluid leaking on the ground, inboard of the left main landing gear, in an 18-inch puddle. According to Mr. Smith, they placed a five-gallon bucket to catch the leaking fluid which eventually filled about a quarter of the container. He observed an active leak from a component behind the left-hand wing aft spar.[27] (CX 88). He and Mr. Davis thought a bad "O-ring" might be the problem. So, they moved some obstructing clamps and tightened the B-nut to the unit. That did not work. They pressurized the line, as required, and the leak persisted. The area was wet with hydraulic fluid. Mr. Davis depressurized the line as the next step in removing it and wiped the area down. The particular hydraulic line was support for the aircraft's landing gear. He assumed the leak was not later found in the hanger because they had tightened the B-nut. Mr. Smith prepared a handwritten report of the incident. (CX 88).

According to Mr. Smith, when they heard the aircraft was going to the hangar, Mr. Davis resecured the line and Mr. Smith cleaned up the ramp and picked up the towels and bucket. (CX 88). Although Mr. Smith testified the last time he saw it the line was still leaking, he later testified the line was secured and everything was wiped clean. (TR 450). Mr. Smith did not report the leak to anyone. Mr. Davis testified that it was still leaking when the aircraft was taken to the hangar. (TR). Mr. Smith added that he felt (generally) the maintenance checks and balances

[26] As stated earlier, I do not consider this matter as part of the complaint against UAL.

[27] This may have been to the landing gear sequencing valve. (CX 89). The computerized maintenance log entry notes the line was "tagged." (CX 89).

were in jeopardy and that he felt intimidated to get aircraft out on time (at the expense of maintenance).

Oddly, Mr. Davis did not testify about a bucket or a sizable pool of fluid on the ground, as had Mr. Smith. Mr. Davis testified the leak was dripping on the ground from the aircraft's belly. Noticeably, the computerized log of Mr. Davis' maintenance activities, for the October 25 incident, does not show a drip rate, unlike some earlier hydraulic fluid leak write-ups he had made. The drip rate is one means of ascertaining whether a leak is "allowable" or not.

Mr. Davis' supervisor, Ms. Dan Eades ordered the plane be taken to the maintenance hangar. Mr. Sibley did not know if she had seen the leak. According to Mr. Davis, the aircraft was still leaking hydraulic fluid when it was sent to the hangar. The maintenance hangar mechanics, Messrs. Kilian Zerr and Richard Conner, after following several maintenance procedures, including steam cleaning the area and pressurizing the system, could not locate the leak on the valve that was tagged. Mr. Conner thus, in a rare occasion, asked for the gate mechanic who had found the leak to come to the hangar and show it to him. Mr. Zerr did not initially know that it was Mr. Davis.

Mr. Zerr left for the day before Mr. Davis arrived at the hangar. Mr. Davis pointed to where the leak had been, but Mr. Conner did not see a leak. Mr. Conner testified that Mr. Davis said, "you must have tightened the B-nut." Mr. Conner added that hydraulic leaks do not spontaneously heal, but that tightening fittings might cure a leak. I found Mr. Conner very credible. After observing the hangar mechanics' examination, Mr. Davis "signed-off" on his leak write-up. (CX 86). He had written-up the

leak in the pilot's log which shows up in the Maintenance Release Document ("MRD") which the pilot can see so the pilot would see it in case he was overridden by a supervisor. (TR 325-6).

Mr. Sibley became involved in the incident. He was not aware of anything about a bucket, at the time. (TR 1173). Mr. Sibley also asked Mr. Davis to identify the leak. Mr. Sibley testified that Mr. Davis had not written-up his work. No leak was found and according to Mr. Sibley, Mr. Davis offered no explanation. Mr. Davis felt Mr. Sibley was accusing him of sabotage. However, Mr. Davis testified he said there had been a leak and he had witnesses. Mr. Sibley testified that after his conversation with Mr. Davis became "heated", he decided to privately counsel Mr. Davis later in the day in the presence of a shop steward, Mr. Rowland. (CX 86).

Mr. Davis' delay performance was not a topic in that counseling. Mr. Sibley testified delay performance was not an issue then because he had not yet been tasked to review the delay performance data by Mr. Krasovec. Mr. Davis confirmed that their discussion did not involve his delay performance. Mr. Rowland's written statement concerning the counseling was admitted as CX 90. The thrust of Mr. Sibley's counseling was that Mr. Davis must adhere to Maintenance Manual specifications in writing up fluid leaks and not write them up as pilot log entries as he had done in this instance, as well as the fact no leak was found when the aircraft was taken to the hangar. (CX 86; TR 329, 465). Mr. Sibley meant that if a leak was within "allowable"limits he

did not expect it to delay the flight. (TR 1125). Mr. Davis had not indicated whether the hydraulic line in question had been disturbed or retorqued. Mr. Rowland confirmed that the meeting concerned Mr. Sibley's expectations of Mr. Davis as a gate mechanic and that while Mr. Sibley had no problem with legitimate write-ups, Maintenance Manual limits for leaks must be noted in any write-up. (CX 90).

Mr. Douglas Harwood, who has been a maintenance supervisor for UAL since 1989, testified about the October 25, 2000, hydraulic leak incident. He saw an exchange between Mr. Sibley and Mr. Davis at the hangar. He recalled Mr. Sibley asking Mr. Davis to identify the leak, but the latter did not. Mr. Harwood did not recall Mr. Davis offering that he had already repaired it.

November 16, 2000 Tire Incident

UAL Captain Kurt Malerich testified concerning the November 16, 2000, defective tire incident. He was the pilot for the A-320 Airbus scheduled to depart Mr. Davis's gate that day. He also has an A&P Mechanic's license. Mr. Davis had informed him that he and two mechanics, Messrs. Collins and Komel, believed the tire should be changed, but that their supervisor, Mr. Rash, felt it was unnecessary. Captain Malerich examined the tire himself and decided to err on the side of safety by insisting it be changed prior to takeoff. Tire cuts are not unusual and the aircraft maintenance manual lists the parameters for tire damage. Mr. Rash showed him the manual limits. Captain Malerich believed the tire was "marginal" and probably would be safe for everyday use but not in an emergency. Had the tire been changed when he first asked, he could have had an on-time departure. He added, it is a mechanic's duty to inform the flight crew of defects and he would encourage mechanics to do so. The captain testified he was aware of the IAM mechanics' "contractual" activities and admitted that there may have been a work "slow-down" in 2000. His written report, found at CX 59, describes the large, 1 - 1 ½ inch, 1/4 - 1 inch deep gash on the sidewall extending to the first tread area and an additional 3/8 inch to ½ inch straight cut extending across the first tread about 2 inches beyond the other cut.

First Officer and flight crew member, John Watson testified about the tire incident. He has flown for UAL for twenty-four years. Before a flight, he looks at the aircraft's maintenance history, e.g., deferred items and inoperative but permitted items, and conducts a pre-flight inspection of the aircraft. On November 16, 2000, he encountered the mechanics who informed him of the defective tire. They had not yet checked the Maintenance Manual limits. Mr. Watson inspected it, observed a 2-3 inch cut around the top edge and informed Captain Malerich. It was he who approached Mr. Davis, who was working in the aircraft cabin to ask if the tire had been changed. Mr. Davis then informed him of the dispute between the mechanics and Mr. Rash. First Officer Watson passed this on to the captain. Their concern was if the tire was defective it could impact safety with a lower "burst" speed. He testified it was good for the mechanics to have informed the crew of the matter. The flight crew can have the final word on repairs. He prepared a pilot report due to the subsequent FAA investigation. (CX 74). First Officer Watson added that "safety is the basis of the entire (airline) industry; the number one thing."

Mr. Davis testified that during his pre-departure walk-around of the Air Bus 320 aircraft, he observed the outboard number 4 tire on aircraft 4027 was damaged with a gash and two shallow slices on its shoulder. (CX 63). At the time the tire was covered with de-icing fluid as the plane had just been de-iced. While he did not believe the sidewall slices were an issue, the gash was a "no-brainer" in terms of requiring tire replacement. He nevertheless checked the Maintenance Manual. All three mechanics agreed the tire must be changed, but their supervisor, Mr. Rash, disagreed. Tire changes are quick and easy and can be accomplished with the passengers aboard. Because of the dispute and a broken dolly needed to change the tire, the process took longer.

Mr. Komel testified he had examined the tire visually and found a cut on or approaching the tire's sidewall and saw wire cords. He believed the maintenance manual required changing the tire. He reported the incident internally, but did not file an FAA complaint for fear of retribution. Mr. Komel prepared a written statement concerning the incident. (CX 70). He testified it took 2-2 ½ hours to replace the tire. His statement shows he had suggested Mr. Davis inform the crew of the disagreement.

Mr. Rash testified, in concluding the tire was serviceable, he looked at the Maintenance Manual requirements and examined the tire cuts. (CX 63-Maintenance Manual extract for tire cuts). Mr. Rash did not remember any "chunks" being out of the tire, but only two cuts. He did not remember any cuts to the tire's sidewall. He used a mechanical pencil, which he believed was better than a ruler, to measure the tread depth and the cut itself. He thought the tire was within limits and twice tried to convince the crew of the same. However, since the captain wanted the tire changed, Mr. Rash ordered it, but informed the former that flight operations would be credited with any delay. Mr. Rash's written statement reflects he examined "a cut to the outboard shoulder of the tire". (CX 73). But, Mr. Cannon reported he had informed him of "two thin slices in front of a chunk." (CX 77).

Mr. Rash testified that it is unusual for a mechanic to inform the flight crew of their differences of opinion, but UAL has no policy concerning that. He did not inform either Mr. Sibley or Mr. Cannon of the tire incident prior to Mr. Davis being walked-off the job. He later asked Mr. Harwood, a maintenance supervisor, to check out the tire. Mr. Rash added that "safety has to be primary" and it's "the most important rule." He did not believe he tried to pressure the mechanics to sign-off on the tire and felt the necessary checks and balances in UAL's system had worked "somewhat" in this instance. Mr. Rash has seen the severity of the damages caused by a tire coming apart– often costing several thousands of dollars. In this case, disagreeing with UAL's Quality Assurance department's "close-call" assessment, he believed compliance with the Maintenance Manual would have been safe. CX 77 is Mr. Rash's written statement concerning the incident. He added that it is not his practice to get an aircraft out at all costs.

Mr. Douglas Harwood, who has been a maintenance supervisor for UAL since 1989, testified about the November 16, 2000, tire incident. He investigated it the same day and took photographs of the tire. He pulled up the computerized aircraft AMIS history information (CX 53) and checked the Maintenance Manual tire criteria. The plane had come in from Boston, the

night before, which apparently had found no problem with the number 4 tire. He measured the tire gash and found the tire was within serviceable limits. The tire was on a wheel when he first saw it and it was likely inflated. He later prepared a written statement concerning the incident. (RX B-3).

Mr. Thomas Rowland, an IAM shop steward and UAL Flight Safety Investigator, whom I found credible, also photographed the tire in his role as a safety investigator because he believed it might end up in an FAA investigation, as it did. CX 79 is his written statement concerning the tire and CX 62 the photographs he took. Mr. Rowland believed the tire was not serviceable. He testified he had trained mechanics how to report safety violations, but, it was his opinion that many feel too intimidated to report violations to UAL. He has reported violations to the FAA and not been disciplined for doing so, although he perceived management got very upset over it.

UAL's Indianapolis Engineering Department found two cuts in the tread shoulder and one in the sidewall where the cords were exposed. (CX 61). The sidewall cut rendered the tire unserviceable, under Aircraft Maintenance Manual for A319-320 Task 32-41-00, page 617. (CX 61; CX 63). They reported UAL's Quality Assurance initially concluded the serviceability of the tire at the time was a "close call." (CX 61)(But, see CX 82 and CX 78-concluding the tire was serviceable and the sidewall cut was not there on 11/16/00). (Photos at CX 62).

FAA inspector Donald J. Williams testified concerning his investigation into the November 16, 2000, incident involving aircraft N827 UA and its number 4 tire. Sometime after the incident the tire "disappeared" but later resurfaced although there was a resulting "chain of custody" issue as to whether it was in the same condition. (See CX 81; CX 82). It could thus not be determined when the sidewall damage he saw had occurred. He found the longitudinal cut across the tire's cord line questionable. He found a definite cord exposure to the sidewall. Since the crew had rejected the aircraft, UAL had engaged in no wrong-doing. Had the tire not been rejected, UAL would have been in violation (of safety regulations). Mr. Williams observed that UAL has a performance tracking tool based on the number of discrepancy write-ups. That has lead to the mechanics being concerned if they have too many write-ups, "that's it". He believed the mechanics felt the potential for retribution. CX 61 is UAL's draft response to the FAA concerning the tire incident. Mr. Williams added that Mr. Davis had been involved in other FAA investigations and gave an example of one where he had correctly identified an out-of-date maintenance manual.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Both Mr. and Mrs. Davis were employees of United at the time of the events subject to this case and thus entitled to the protection of AIR 21. They remained United employees as of the date of the hearing. Mr. Davis is an A&P mechanic. United is an air carrier subject to the provisions of AIR 21. Mr. Davis made complaints related to air carrier safety and allegedly suffered retaliation as a result.

Protected Activities

I immediately reject United's contention that complaints which touch on aircraft safety made internally to those without control over the complainant's employment are not protected activities; the law is otherwise. The law is established that even complaints to co-workers as well as "informal" complaints to supervisors can be protected activities and that the form of the "complaint" is not critical.[28] Thus, the fact Mr. Davis did not contact the FAA or did not file a UAL Safety-gram, in each instance, is not determinative.[29] Moreover, UAL supervisors were quite involved in each of the incidents here.

UAL utilizes a system of computerized maintenance log entries reflecting maintenance activity. Not every such log entry or "write-up" noting a defect made by Mr. Davis, during the course of his employment as a mechanic, in and of itself, constitutes a "protected activity." Many of the computerized maintenance log entries or "write-ups" relate to defective seats, defective coffee makers, etc., and are obviously not safety-related. Mechanics' entries into the similar flight-crew logs, e.g., concerning a broken cockpit light, are no different.[30] The UAL mechanics know that the flight crews generally do not see their maintenance log write-ups, but will see entries they make in the pilot's log or flight crew log. Not every write-up results in a delay, but, according to Mr. Sibley, all that do "automatically" go to the FAA.[31] A log entry related to a "bogus" defect would not ordinarily qualify as a protected activity.

The Act itself does not require that an actual safety "defect" exist. In fact, it does not require any "defect" at all. At a minimum, it protects employees providing "information" related to any alleged violation of federal laws or standards "relating to air carrier safety." ERA case law extends this to any objectively reasonable perceived violation touching on air carrier safety. It does not matter if the allegation is ultimately substantiated. In this case, it is shown that, by regulation, the A&P mechanics must abide by United's manuals which are derived from the aircraft manufacturers and further refined. A&P mechanics also have an independent responsibility for aircraft safety, under FAA regulations.

It is not contested and it is established that Mr. Davis did show Mr. Cannon, the on-duty maintenance supervisor, the hydraulic leak which he found on September 29, 2000. It is not contested and it is established that he wrote-up the October 25 hydraulic leak in the pilot's log and that his supervisor, Dana Eades, was informed. The fact the systems here showing hydraulic

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[28] For example, the quality control inspector's complaint, in *Mackowiak, supra*, was made to the quality assurance department which only investigated the potential problem and lacked any supervisory authority over the complainant/inspector.

[29] As discussed in more detail below, there may be times when a mere maintenance log entry related to air carrier safety alone may itself constitute protected activity. However, that is not the case here.

[30] I need not decide here whether or not the routine maintenance log entries regarding safety matters here are protected activities, in and of themselves, because of the involvement of supervisors and pilots' logs.

[31] This may be because the FAA publishes data regarding airline on-time departures.

leaks must be pressurized prior to being signed-off, under FAA regulations and UAL's maintenance manuals, is not challenged. It is not contested and it is established that Mr. Davis showed the aircraft tire which he found to be defective, on November 16, 2000, to Mr. Rash, the on-duty maintenance supervisor. Even though mechanics, as part of their job duties, are responsible to their lead mechanic or supervisor for the proper servicing of an airplane or any other mechanical work they are assigned, the Act explicitly covers information provided to the employer. Thus, at the point the Complainant informed the supervisors of the safety-related information, and most definitely at the time the pilots were informed, the mechanic's reports of potential safety defects became "protected activity". Both the supervisors and pilots were in a position to act upon safety-related complaints.

Finally, as First Officer Watson testified, since the aircraft captain has the final word on the safety and airworthiness of the aircraft, reports Mr. Davis made directly to the pilot or captain, or via the pilot's log or crew log, whether directly or through another (the language of the Act), such as on September 29, 2000, October 25, and November 16, 2000, constituted the type of internal complaint which is without doubt considered a "protected activity."[32] Captain Malerich testified that it is, in fact, a mechanic's duty to inform the flight crew of defects.[33] First Officer Watson testified that before each flight he examines the aircraft's maintenance history. That history is largely created by mechanics, such as the complainant here. The flight crew's testimony that it is "good" for mechanics to inform the crew of defects is certainly indisputable.

Keeping supervisors informed may be part of the gate mechanics' job. Even though United might believe supervisors may be better at balancing the potential for delay versus a repair requirement, the broad purpose of the Act would best be served by protecting mechanics, particularly those with A&P licenses, who have such differences of opinion with supervisors regarding a safety issue and who take the matter to the flight crew.[34]

Whether the two hydraulic leaks were confirmed or proven or not and whether the tire was in fact unserviceable, is not determinative of the outcome of this matter. Nor need I decide those questions. It does not matter whether those allegations are ultimately substantiated. It has been established and is not contested that Mr. Davis and others, including other mechanics, believed that permitting the aircraft to operate with the hydraulic leaks and purportedly defective tire would have been safety violations. Their subjective beliefs, however, are not, in and of themselves sufficient; for the alleged safety-related matter must have been "objectively" reasonable.

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[32] UAL's Director of Quality Assurance admitted as much, in CX 82, when reiterating the captain's "final authority for airworthiness."

[33] I reject UAL's argument that reports to pilots are "akin to merely telling a coworker." (UAL Brief at p. 4). The pilot in command has the last word on the aircraft's safety, airworthiness, and whether the aircraft will fly.

[34] This is not to say that every such disagreement creates a "cause of action" under the Act. It appears that at least some mechanisms exist to resolve such disagreements. Under such circumstances, it is only when the mechanic is subject to a resulting adverse personnel action that the matter is actionable.

The fact that two other mechanics, Messrs. McGuire and Smith, and the pilot, Captain Lambeth, all of whom I find credible, all agreed the September hydraulic leak required service and that a failure to do so would have had potentially serious consequences establishes the complaint was objectively reasonable. It has been established and is not contested that both Mr. Davis and Dennis Smith, believed the October 25, 2000 hydraulic leak required service and that a failure to do so would have had potentially serious consequences; that is sufficient. There may have, in fact, been a hydraulic fluid leak, as described by Messrs. Davis and Smith, of some amount, on October 25, 2000, and that by tightening the nut the leak was abated thus making it subsequently unidentifiable. I need not and do not determine whether such a leak was one that would be considered "allowable" under UAL's Maintenance Manual or one that required repair.

It has been established and is not contested that Mr. Davis and others, including mechanics, Messrs. Komel and Rowland, and Pilot Malerich, all of whom I find credible in this instance, agreed the tire was not serviceable; that is sufficient to qualify as protected activity. Although significant, the fact that Messrs. Cannon, Rash, Harwood, and Sibley believed otherwise does not refute my conclusion that the concerns of Mr. Davis and the others named were not objectively reasonable. FAA investigator William's assessment of the defective tire lends some support as well, but is not determinative because of the chain of custody issue related to the tire.

The varying interpretations of UAL's maintenance manuals by the mechanics, supervisors, and flight crew members does not prove a lack of objective reasonableness in this case. I find Mr. Davis' "complaints" touched on matters protected by the Act and were objectively reasonable.

Respondent's Awareness of Protected Activities

I find Messrs. Sibley and Krasovec, the UAL decision-makers, had knowledge of Mr. Davis' various protected activities. Both Mr. Krasovec and Mr. Sibley knew of the October 25 hydraulic fluid incident. Mr. Sibley's knowledge of the September hydraulic fluid incident is imputed because of Mr. Cannon's role in the walk-off. Mr. Davis mentioned the tire incident, on November 16, in his appearance before Mr. Sibley, according to Mr. Cannon. Certain other of United's supervisors, i.e., Messrs. Cannon and Rash, System Maintenance Control Supervisors, were contemporaneously aware of the September hydraulic leak and the November 2000 defective tire incident, but they were not the ones making the actual suspension or termination decisions.

It is established that Mr. Sibley, the Hangar Operating Manager, was aware of the alleged October 25, 2000 hydraulic leak incident and was aware of the November 16, 2000 defective tire incident at the time of making his decision to "walk-off" Mr. Davis, on November 16, 2000. Since the tire incident was not a basis of the walk-off, Mr. Sibley understandably testified Mr. Davis had not raised the matter. In any case, it was not relevant to their discussion. Mr. Sibley may or may not have been aware of the September 29, 2000 hydraulic leak incident; that was not established, although Mr. Cannon, who participated in the walk-off session and the evaluation leading up to it, was. Mr. Cannon's knowledge is sufficient because of his substantial role in the "walk-off" decision.

The written materials presented to Mr. Krasovec, who made the termination decision at the IRH, did not refer to either the September 2000 or November 2000 incidents. It was not shown that Mr. Krasovec was aware of the September 29, 2000, hydraulic leak incident or the November 16, 2000, tire incident, on November 30, 2000, the date of the IRH. (See RX A-9; CX 33). The undisputed testimony was that those two matters were not raised before Mr. Krasovec at the IRH, on November 30, 2000. Nor did Mr. Davis or his union representative raise any issue at the IRH concerning retaliation or discrimination.

However, despite the fact Mr. Krasovec did not explicitly refer to it as a basis for termination, the written materials presented at the IRH did refer to the October 25, 2000 hydraulic leak incident. (CX 33). The fact that Mr. Davis reported an alleged hydraulic fluid leak that day when none could be subsequently found was one of the bases, albeit not the primary or substantial one, for the termination by Mr. Krasovec. (CX 33). When asked if he relied upon the October 25th counseling in his decision to terminate Mr. Davis, Mr. Krasovec answered essentially that it was part of the company presentation; it related to Mr. Davis' overall performance and procedural deficiencies in documenting his writeups. (TR 882-887).

Although Mr. Sibley consulted with his boss, Mr. Krasovec, on November 16, 2000, concerning the proposed disciplinary action, i.e., possible termination for delay performance, the evidence does not establish that Mr. Krasovec knew of the tire incident or that either was knowledgeable of the particulars of the tire incident which had occurred earlier that day. CX 39, Mr. Davis' detailed maintenance history for 2000, does not list the September 29, 2000, hydraulic leak, but does list the October 25, 2000 hydraulic fluid leak and the November 16, 2000, tire incident.[35] However, there is no evidence that it (CX 39) was presented to Mr. Krasovec. Moreover, at the IRH, Mr. Krasovec did more than simply ratify Mr. Sibley's decision. Significantly, however, the outcome of this case does not hinge on Messrs. Sibley's and Krasovec's knowledge, even if they had full knowledge, imputed or otherwise.

CX 85 shows that UAL was aware of the FAA's investigation into the tire incident as a result of a FAA hotline complaint by at least November 21, 2000, ten days before the IRH hearing in which the Complainant was terminated. But, it does not show that Mr. Krasovec was aware of it on November 30, 2000.

Even if the UAL decision-makers, Messrs. Krasovec and Sibley, were aware of all of Mr. Davis' protected activities, i.e., the September hydraulic fluid leak, the October hydraulic fluid leak and the November tire incident, at the time they took the adverse personnel actions, and even if they considered those matters, they nonetheless had a legitimate business reason, that being the unsatisfactorily-explained deterioration of Mr. Davis' delay performance following the expiration of the IAM-UAL agreement, upon which to act. In the first 13 days following expiration of the union contract, Mr. Davis had more delays attributed to him than in the entire first six months of

[35] Since the aircraft arrived at DIA on November 15, 2000, the repair is listed under that date rather than the actual repair date, but no delay minutes are attributed to Mr. Davis for the action.

the year; then, unlike pre-contract expiration, almost one delay for each day he worked. It was established, by clear and convincing evidence, that UAL would have taken the same actions against Mr. Davis, for the change in his delay performance, even absent those three incidents.

Unfavorable Personnel Actions

It is established and not contested that Mr. Davis suffered an unfavorable personnel action, i.e., suspension without pay between November 17 through and including December 17, 2000 and termination effective November 30, 2000. He lost $6,000.00 in pay. He was reinstated on December 18, 2000, although assigned to a new work area. His union co-workers contributed $3,500.00 to tide him over, an amount he hopes to repay.

Protected Activities as Contributing Factors in Unfavorable Personnel Actions

While the temporal proximity of the complainant's walk-off, on November 16, 2000, to the defective tire report earlier that day is sufficient to establish the inference of a causal nexus and thus establish a *prima facie* case, and the October hydraulic fluid incident was presented at the IRH, given United's clear and convincing evidence of a legitimate business motive for its actions, such temporal proximity alone is insufficient to meet the complainant's ultimate burden of proof.

Despite the Complainant's strong belief to the contrary, it is not established that either of the incidents, i.e., September or November 2000, contributed in any way to his suspension and termination. In order to constitute a "contributing factor" the protected activity must only "tend to affect in any way the outcome of the decision." All of United's witnesses testified that the Complainant's termination was based solely on his the changes in his delay performance as set forth on the DB2 computer print-out received from UAL's San Francisco computer department. However, the company did present information concerning the report of an apparent bogus hydraulic leak on October 25, 2000. Thus, that incident was, in part, a basis for the termination.

Mr. Norman had given Mr. Krasovec instructions to examine operating performance statistics and look for changes in employee behavior during the period of labor strife, in 2000. Some time after October 25, 2000, Mr. Sibley was assigned to carry out this task by Mr. Krasovec. He, in turn, enlisted Mr. Cannon's assistance. Mr. Sibley asked for a list of DIA's top 50 mechanics with the most delays. He considered only AR and AS delays and used the gross numbers rather than percentages to compare the mechanics. There can be little dispute that Mr. Davis had the greatest change in delay performance beginning in July 2000. In fact, there was only one other mechanic who also had double-digit delays in and after July 2000, and those were much fewer than Mr. Davis' delays. Based solely upon that delay performance change, Mr. Davis' lack of a satisfactory explanation for it and UAL's perception that he was engaged in an illegal job action, he was terminated.

The maintenance log entry or write-up made, relating to the allegedly defective tire on November 16, 2000, may itself constitute a "protected activity". (CX 39). I need not decide that

here since there was more, as explained above. While Mr. Davis wrote-up the October hydraulic leak in the pilot's log, according to Mr. Sibley, he was not charged a delay for it. Complainant's counsel conceded that Mr. Davis did not make a "complaint" of a safety violation regarding the October hydraulic leak**.** Mr. Krasovec may have considered the October bogus leak only because it was brought up in the IRH, but in firing Mr. Davis he stated the focus was on his illegal job actions by creating delays.

As the Ninth Circuit held in *Mackowiak*, the law simply forbids discrimination based on competent and aggressive inspection work. Under the *Mackowiak* rationale, an air carrier may not discriminate against a mechanic because he or she does their job too well. Thus, if a mechanic suffered an adverse personnel action because of zealous, but legitimate maintenance write-ups he or she may be protected. If the same mechanic is subjected to job discrimination for the delays resulting from his or her zealous maintenance write-ups he or she also may be protected. However, that is not the case here. The overall number of Mr. Davis' maintenance write-ups remained fairly constant in 2000 and was not considered at all as a basis for his suspension or termination.

Mr. Davis may have a number of legitimate complaints concerning the bases for his termination, but none that I may remedy. It is legitimate for him to argue that Mr. Sibley could have extended him, as a 17-year UAL employee, the courtesy of looking behind the raw delay numbers set forth on the DB2.[36] In spite of the fact that together all the DIA mechanics Mr. Sibley examined, or at least the top 50 on the DB2, averaged 35 delays per day over the period of a year and testimony that it would have been impractical to examine the legitimacy of every delay for each mechanic for each day, only Mr. Davis and perhaps one or two other gate mechanics were terminated for their delay performance. Thus, when Mr. Davis failed to satisfactorily defend himself, on November 16, 2000, Mr. Sibley certainly could have looked into the bases and legitimacy for Mr. Davis' delays. More significantly, Mr. Davis and his union representative should have presented that detailed information at the IRH , but chose not to do so. (CX 33). Rather, Mr. Brown and Mr. Davis merely argued that he could not be held responsible for delays since he had overall adhered to all FAA rules and UAL maintenance manuals. (CX 39 is a 73-page detailed summary of Mr. Davis' repair reports from January 1, 2000 through November 16, 2000; it was not submitted at the IRH. The report depicts the nature of each of his write-ups, any service or repair made and any ensuing delay minutes precipitated thereby).

There was no evidence presented to suggest that the other gate mechanics, in Area 1of DIA, who had similar work to do on similar aircraft, did not have similar accuracy problems with their delay performance statistics and reports. In fact, the evidence points to just the opposite.

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[36] Complainant's counsel stated, in opening, "The evidence will be undisputed that no United manager made any effort whatsoever to determine if any of the delays on which they based, they say they based Mr. Davis' termination were in fact bad delays or reflected any wrongful conduct or conduct in violation of the union contract or any standards whatsoever.. . all they had was the summary in terms of the number of delays before versus after July and the change in the increase in the percentage of delays between pre- and post-July regarding Mr. Davis and other mechanics to justify their purported belief that Mr. Davis was involved in an illegal work action. . ." (TR 84-5).

While Mr. Sibley could have considered the changes in delay performance in terms of percentage of change, there was no requirement that he do so. Moreover, neither percentage changes nor the raw numbers, in and of themselves, provide a totally "complete" picture. However, the group of fifty evaluated on the DB2 were considered on a "level playing field." Other DIA mechanics, who had not reported safety violations, were held out of service or disciplined based upon changes in their delay performance. (TR 928-929, 985-986). No disparate treatment was proven.[37] It was legitimate for Mr. Sibley to consider that before July 2000 Mr. Davis was able to "manage" his gate, with minimal delays, compared to the period after July 12, 2000. Moreover, Mr. Davis had been warned of the consequences of further infractions.

In *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271 (7th Cir. 1995), the court rejected a quality control auditor/complainant's argument that an employer violates the ERA anytime it disciplines or terminates the former who creates friction in his relations with coworkers or supervisors since such friction is inherent in the job of an auditor. The court observed that the complainant there was attempting to hide behind his protected activities as a means to evade termination for non-discriminatory reasons. It added, "'[T]he rights afforded to the employee' are a shield against employer retaliation, not a sword . . ." *Kahn* at 279. "Certainly Congress did not intend to 'tie the hands of employers in the objective selection and control of personnel' in enacting various laws proscribing employment discrimination." *Kahn* at 279. That same rationale applies here, as well.

Finally, it is not as if Mr. Davis was not forewarned of the possibility of discipline for those mechanics who may have engaged in what UAL considered job actions. On July 18, 2000, he was given a counseling letter, dated July 13, 2000, for his alleged participation in a purported IAM sick-out. Although Mr. Davis denied he participated in any sick-out, he admitted he was not sick on July 13, 2000, the day for which he took sick leave. That letter from Mr. Sibley warned him that if his participation in an illegal job action continued, he would be subject to discipline up to and including termination. (CX 33). This past "disciplinary" record was presented to Mr. Krasovec at the IRH and the evidence establishes it formed a portion of the termination decision.

Respondent's Clear and Convincing Evidence of Legitimate Motives or Protective Activities not Bases of Action

United presented clear and convincing evidence that it had legitimate motives for suspending and terminating Mr. Davis and that the discipline was not based upon either his protected activity as alleged or otherwise. As set forth above, Mr. Davis' discipline was based solely upon his unsatisfactorily explained change in delay performance after the IAM-UAL contract expired in July 2000, which UAL believed constituted illegal job actions. Neither of the incidents which Mr. Davis contends contributed to the discipline were considered as a basis for

[37] Both Messrs. McGuire and Campbell, whom Mr. Cannon counseled regarding their delay performance, and who were not walked-off, had far fewer post-contract delays than Mr. Davis. (See the DB2 and TR 271). Their earlier disciplinary records are not in evidence. Another DIA mechanic was also subsequently walked-off based upon deteriorating delay performance. (TR 526).

that UAL action. Neither the November 16, 2000 tire incident, nor the October 25, 2000 hydraulic fluid matter were reflected in the DB2 data relied upon in his discipline. As far as UAL was concerned, the October 25 incident was an alleged false report of a hydraulic leak which formed a part of the basis for termination only insofar as it too supported UAL's belief that Mr. Davis was engaging in illegal job actions. Moreover, Mr. Davis had been warned after having received a previous "level" that his next discipline could result in a level 5 termination.

Although the October 25, 2000 hydraulic incident would be considered a "protected activity" and even if it was considered among the Complainant's allegations, it formed no part of the November 16, 2000 walk-off decision. That incident was submitted, at the November 30, 2000, IRH, essentially as a suspected bogus report, an example of what UAL considered yet another illegal job action, and not as a true report of a safety violation. UAL has established, by clear and convincing evidence, that it would have taken the same actions against Mr. Davis, even absent that October incident.

I was concerned with the possibility that some or all of Mr. Davis' delays, reported on the DB2, may have involved safety-related matters and had UAL disciplined him for reporting such matters, i.e., entering writeups which resulted in delays in the computerized maintenance logs, that United could be considered to have violated the Act. Many of Mr. Davis' maintenance activities delays certainly related to safety matters, but many did not. For example, in January 2000 he was charged for a delay because of a broken seat, in March for a broken lavatory seat, in August due an adjustment of the captain's seat and a leaking lavatory, and, in October for window issues. On the other hand, in 2000, he was also charged for delays for servicing/repairing fuel leaks, oil drips, hydraulic leaks, bad tires, engine throttle controls, defective brakes, evacuation slide problems, many, if not all of which involve air carrier safety.

However, given the fact UAL did not look behind the raw delay performance numbers and disciplined Mr. Davis not for any one or all of the delay incidents themselves, but rather for the unsatisfactorily explained post-contract statistical changes, I cannot find UAL violated the Act.[38] Even the Complainant's union representative, Mr. Brown, testified that he could not think of any way, aside from examining the DB2 report, UAL could have determined which mechanics had engaged in illegal job actions. (TR 555-557). Although the mere articulation of a legitimate reason for UAL's actions is sufficient, I find the evidence and data presented by UAL and the

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[38] UAL's argument that "[T]he Act does not prohibit disciplining an employee for consistently failing to dispatch trips on time. . ." is myopic because such discipline, if based upon delays precipitated by reports of safety concerns, might constitute a violation of the Act, absent the right circumstances, such as those presented in this case. Equally applicable under AIR 21 matters, are the Courts' observations concerning the Mine Safety Act, in *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772, at 778-9 (CA DC 1974), and the Surface Transportation Assistance Act, in *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1st Cir. 1998). In *Phillips*, the Court wrote, "The temptation to minimize compliance with safety regulations . . . is always present. . . Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foremen or mine top management." In *Clean Harbors*, the Court, upholding a finding of a violation of the Act, observed, "A company may have many actors and their individual perceived interests . . . may differ from what is ultimately in the company's best interest, e.g., avoidance of a lawsuit for retaliatory discharge." *Clean Harbors* at 23. (The genesis of the *Clean Harbors* complaint was customer complaints over delays and costs associated with the complainant's strict inspections and adherence to safety regulations).

consistent testimony of its witnesses clearly and convincingly established UAL's legitimate purpose and motive for its actions.[39] *See Kahn* at 279.

Certainly, the unique circumstances, in 2000, of the IAM-UAL contractual negotiations difficulties gave the UAL maintenance management, from Mr. Norman down to Mr. Sibley, a legitimate basis to attempt to ferret out what they considered to be illegal job actions on the part of their employees. Mr. Davis admitted that even if the incidents forming the basis of his complaint had not happened, UAL would have fired some mechanic at DIA. (TR 422-423). The Act was passed to shield employees reporting air carrier safety information, but not to permit employees to attempt to use its protections as a "sword" to justify inappropriate "job actions."

I find United has established, by clear and convincing evidence, that it had no discriminatory motivation, under AIR 21, for taking the actions it did against Mr. Davis. Thus, analysis, under the "dual motive" concept is unnecessary.[40]

Complainants' Burden the Respondent's Legitimate Reasons a Pretext

Although the Complainant presented evidence which suggests to him that UAL's legitimate reasons for discipline, i.e., reliance on the changed delay performance statistics, was a pretext, he failed to prove that it was more likely than not, or in other words, by a preponderance of the evidence, that any pretext existed. Mr. Davis was walked-off and ultimately terminated for a short time period for the
unexplained adverse change in his delays performance after the IAM contract expired, based on UAL's belief he engaged in illegal job actions. I need not determine whether his conduct constituted an illegal job action, but only if that was UAL's motivation for its actions. As the court stated in *Kahn*, "'It is not enough for the plaintiff to show that a reason given for a job action is not just, or fair or sensible . . . [rather] he must show that the explanation is a 'phony reason.'" *Kahn* at 278, *citing Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994). Mr. Davis has not met this burden.

Aside

It is clear to me that aircraft safety is a primary concern for United. It could not function as a carrier absent such a concern. The safety concern begins at the top and involves all employees. UAL's management personnel, their families and friends fly on UAL aircraft. Both the supervisors and mechanics who testified are dedicated to safety. It is clear these employees

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[39] "No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers [the Energy Reorganization Act] does not interfere." *Kahn* at 280 (citations omitted). "It is well-settled . . . that an employer may terminate an employee for any reason, good or bad, or for no reason at all, as long as the employer's reason is not proscribed by a Congressional statute." *Kahn* at 279 (citations omitted).

[40] Even if I had considered the October 25 incident as a basis for the complaint, under the dual-motive analysis, I would still have found UAL established legitimate business reasons for its actions and denied relief.

would never permit the operation of an aircraft with an obvious safety defect. Indeed, as Mr. Davis testified, the mechanics believe they are "the last defense for safety." The testifying pilots' commitment to safety is equally impressive. Secondly, United could not succeed if it was not concerned with the timely dispatch of its flights. The A&P mechanics would not be so highly regarded and highly paid absent United's business success. However, the balance between safety and delay performance appears delicate and there may always be tension between the twin goals of safety and on-time departures.[41] Nevertheless, safety must always prevail, as UAL's manuals state.

It is not for me to say whether it is inappropriate for UAL to have delay performance goals or to rate supervisors' performance, in part, on meeting such goals; that is UAL's management decision. However, despite UAL's laudable safety record and concerns, its legitimate emphasis, in 2000, on delay performance gave the mechanics who testified before me the perception that decisions concerning borderline safety issues could have the potential to be influenced to some degree by a supervisor's desire for a better performance rating or a mechanic's desire not to be "charged" with a delay.[42] I can only recommend that UAL and the IAM, working together, will remedy that perception. AIR 21 can serve, in part, to shift the balance even more toward safety.

Secondly, the evidence presented demonstrates some lack of communication between management and the IAM mechanics the result of which has been a tendency to breed rumors and a degree of mistrust. A factor in this is UAL's appropriate agreed policy to not disclose bases for specific personnel actions. United and the IAM might consider addressing this by providing periodic information, in the form of statistics, reporting the bases of disciplinary action system-wide. For example, they could report that in 2002 no mechanics were disciplined for delay performance and ten were disciplined for missing work without proper reasons. In this case, the testifying mechanics were convinced Mr. Davis was disciplined for writing up what his supervisors thought was a serviceable tire; that was not the case. If such misperceptions persist, some mechanics might believe they should not "stick to their guns" when a supervisor disagrees with their assessment of a safety-related matter. In fact, the testimony showed that the perceptions concerning accountability for delays had influenced maintenance decisions on some occasions. Obviously, this must be remedied by UAL and the IAM.

Finally, Mr. Davis' stated commitment to safety is a matter which should be commended and encouraged by UAL. Although, as in the cases involving mine safety and quality control inspectors, such attention to detail and such an unyielding attitude may not make a gate mechanic popular with supervisors, Mr. Davis' attention to safety as part of UAL's team makes an essential

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[41] Confirming that the flight crew is the final arbiter of such disputes appears to work well. However, the procedure for resolving safety-related disagreements between coal mine supervisors and workers set forth in the *Phillips* case, *supra* at 779, appears to be another reasonable method of resolving such matters. There, such disagreements are referred to a safety committeeman for immediate evaluation with further channels for prompt review and action.

[42] See also paragraph 5, page 15, UAL's brief.

contribution to United's continuing success.

Damages

Since I do not find that the Complainant has proven his case, the matter of damages is no longer relevant.

CONCLUSIONS

The Complainant failed to establish that his protected activities contributed in any part to his suspension and temporary discharge from United. It is established that United's actions were based on the unsatisfactorily-explained change in the Complainant's delay performance during 2000 after the expiration of the UAL-IAM contract. I have not determined whether or not IAM members, including the Complainant, were engaged in illegal job actions in an attempt to pressure UAL into a new contract; I need not do so. However, it is established that was UAL's motivation for the adverse personnel action here. It is not proven that the adverse personnel actions for the unsatisfactorily-explained change in delay performance, after July 12, 2000, was a pretext for any action based on Mr. Davis' reports of information regarding alleged air carrier safety violations. Nor, given the evidence herein, is "disparate treatment" established.

AIR 21 is intended to be used as a shield to protect those who legitimately report certain air carrier safety matters to their air carrier employers, and others as set forth in the Act, not as a sword for those who might seek to use it to protect themselves from the consequences of inappropriate job actions.

ORDER

WHEREFORE, IT IS ORDERED THAT:

1. Ms. Diane Davis's name be removed hence forth from the caption of the case as her complaint has been dismissed;

2. The relief sought by Mr. George T. Davis, Jr., is DENIED;

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RICHARD A MORGAN
Administrative Law Judge

RAM:dmr

NOTICE: Review of the Decision and Order issued in the above captioned matter is by the Administrative Review Board pursuant to §§ 4.c.(39) of the Secretary's Order 2-96, 61 Fed. Reg. 19978(1996) and 29 C.F.R. §1979.110. That Order provides that the Administrative Review Board is delegated authority and assigned responsibility to act for the Secretary of Labor in issuing final agency decisions on questions of law and fact arising in review or on appeal of certain enumerated decisions and recommended decisions by Administrative Law Judges. This delegation includes any laws subsequently enacted, such as AIR 21, which by statute provide for final decisions by the Secretary of Labor upon review of decisions or recommended decisions issued by ALJs. *See* 49 U.S.C.A. §§ 42121(b)(3)(A). Absent an appeal, this Decision and Order and the administrative file in this matter will not be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, D.C. 20210. *See* 5 U.S.C. §§ 557(b).